No. 80-1264

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ALEXANDER L. STEVAS
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

GENERAL TELEPHONE COMPANY OF THE SOUTHWEST,
Petitioner,

v.

MARIANO S. FALCON,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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PETITIONER'S REPLY MEMORANDUM

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I. THE PROPER SCOPE OF THE CLASS [1]

Respondent Falcon, in his opposing brief in No. 80-1264, asserts that there is "no need" for this Court to grant the petition for a writ of certiorari in this case unless the Court "wishes to abolish or modify 'across the board' attacks in Title VII cases." Respondent further asserts that there is "no substantial conflict that would warrant the court's attention," arguing that there is no conflict between the decision of the court of appeals in the instant case and the decision of the Third Circuit in *Scott* v. *University of Delaware*, 601 F.2d 76 (3d Cir.), *cert.*

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[1] The parent company and affiliates of General Telephone Company of the Southwest are listed in the Petition for a Writ of Certiorari at p. ii.

denied, 444 U.S. 93 (1979). The sole basis for this argument is that a concurring opinion in *Scott* stated that the majority opinion did not constrict the availability of the class action device in employment discrimination cases where "across the board" discrimination is alleged.

In fact, General Telephone's petition for certiorari clearly demonstrated that the decision of the Fifth Circuit in this case is squarely in conflict not only with the decision of the Third Circuit in *Scott*, but also with the decisions of the First Circuit in *DeGrace* v. *Rumsfeld*, 614 F.2d 796, 809-10 (1st Cir. 1980), and the Fourth Circuit in *Hill* v. *Western Electric Co.*, 596 F.2d 99, 101-02 (4th Cir.), *cert. denied*, 444 U.S. 929 (1979).[2] In each of these cases the courts of appeals declined to allow a current employee to represent a class of unsuccessful applicants, because the claims of the purported class representative would not be typical of the claims of the class as required by rule 23(a). The Fifth Circuit allowed precisely this sort of representation in the present case, eliminating the need for an inquiry into typicality by an application of the "across the board" theory.

Moreover, the decision of the Fifth Circuit also obviously conflicts with the opinion of this Court in *General Telephone Co. of the Northwest, Inc.*, 100 S. Ct. 1698 (1980). There the Court stated that where, as here, there is a potential conflict of interest between unsuccessful applicants and employees, "Under Rule 23, the same plaintiff could not represent these classes." *Id.* at 1707. Given this conflict and the conflict among the courts of appeals, there is a compelling need for granting the petition for a writ of certiorari in order to definitively re-

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[2] The conflict between the circuits is clear, as noted in two recently reported opinions. *See* Fields v. Village of Skokie, 502 F. Supp. 456, 460-61 (N.D. Ill. 1980) (rejecting "minority" view of Fifth Circuit); Gilchrist v. Bolger, 25 Fair Empl. Prac. Cas. 67, 70 (N.D. Ga. Feb. 18, 1981).

solve this important and recurring issue of the proper scope of class actions in employment discrimination cases.

II. THE INDIVIDUAL BURDEN OF PROOF ISSUE

The district court in this case ruled that General Telephone had discriminated against the named plaintiff by promoting non-Mexican Americans instead of the plaintiff. Although the district court did not set forth the evidentiary burdens it placed upon the plaintiff and defendant in reaching this decision, the court of appeals affirmed because it would not have been clearly erroneous for the district court to have concluded "that Falcon was *as qualified* as the other people who were promoted." 626 F.2d at 379; pet. app. at 18a (emphasis added). This finding alone, under then-prevailing Fifth Circuit precedent, would have been sufficient to sustain the district court's decision on appeal. *See id.*

In *Texas Dep't of Community Affairs* v. *Burdine*, 49 U.S.L.W. 4214 (U.S. March 4, 1981), this Court made it clear that, contrary to the Fifth Circuit rule, the defendant in an individual employment discrimination case is not required to "show that the plaintiff's objective qualifications were inferior to those of the person selected." *Id.* at 4217. Instead, if candidates are *equally* qualified, the employer has discretion to choose any candidate so long as the choice is not based on unlawful criteria. *Id.* Thus, because the district court may have erred as a matter of law by ruling in Falcon's favor simply because it found him to be as well qualified as those actually promoted, the decision of the court of appeals on the individual claim of Falcon should ultimately be vacated and remanded to the court of appeals, with instructions that the case should be returned to the district court for additional findings of fact and conclusions of law adequate to determine whether Falcon has satisfied the evidentiary burden set forth in *Burdine*.

Such a remand should *not*, however, be ordered forthwith. Instead, the Court should grant the petition but set only the class certification issues for oral argument.

An immediate remand would be inappropriate for two reasons. First, the need to determine whether the initial certification of the class was proper could not be eliminated by a decision by the trial court on remand that Falcon's individual claim was meritless. *See East Texas Motor Freight Co.* v. *Rodriguez*, 431 U.S. 395, 406 n.12 (1977). Second, whether the district court utilized the proper burden of proof in ruling upon Falcon's individual claim of *disparate treatment* in promotions is not relevant to whether the trial court correctly analyzed the hiring claims of the class, which are premised on a *disparate impact* theory. Thus, the important issues presented by the Fifth Circuit's holding that the class was properly certified in this case cannot be resolved by vacating and remanding for reconsideration in light of *Burdine*.

Respectfully submitted,

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